

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs, April 7, 2009

STATE OF TENNESSEE, *ex rel* IESHA FLEMMING, v. ROY ELDER

**Direct Appeal from the Juvenile Court for Knox County
No. F-6571 Hon. Timothy E. Irwin, Judge**

No. E2008-02487-COA-R3-JV - FILED JUNE 16, 2009

The State petitioned to set child support, and upon an evidentiary hearing the Trial Court established child support on the basis of the parent's earnings, but reduced the amount due to the parent's visitation with the child. The State has appealed and we vacate the Judgment of the Trial Court and remand, with instructions to set the appropriate amount of child support.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Juvenile Court Vacated and Remanded.

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the Court, in which CHARLES D. SUSANO, JR., J., and D. MICHAEL SWINEY, J., joined.

Robert E. Cooper, Jr., Attorney General and Reporter, and Amy T. McConnell, Assistant Attorney General, Nashville, Tennessee, for appellant.

OPINION

A petition to set child support was filed by the State of Tennessee and Iesha K. Flemming against Roy E. Elder, Jr. in the Juvenile Court of Knox County, on November 2, 2007. Iesha Flemming is the mother and custodian of Roy'sha Elder, born September 17, 2006, and respondent, Roy Elder, is the father of the child. Flemming is a recipient of Title IV-D services, and as such, the State of Tennessee is a party for the limited purpose of fulfilling its obligations under Title IV-D of the Social Security Act, 42 U.S.C. § 651 *et seq.* and Tenn. Code Ann. § 71-3-124(c). The petition alleged that the child is entitled to support from respondent and that Flemming and/or the State of Tennessee are entitled to support and a judgment for retroactive support and all

necessary expenses as provided by Chapter 1240-2-4(01)(e) of the Tennessee Child Support Guidelines. The petition asked the Court to require respondent to pay child support and to provide medical insurance for the child, or in the alternative, to require respondent to reimburse petitioner for the cost of providing medical insurance for the child. Petitioner also requested the Court to order respondent to pay retroactive support.

At the initial hearing Flemming and Elder testified that they were living together but acknowledged that they had not reported their living arrangement to the Department of Human Services. At the time, Flemming was receiving Temporary Assistance for Needy Families benefits for the child. No action was taken at that hearing.

Another hearing on the matter was held on May 1, 2008 before the referee, and the referee's findings and recommendations were entered the same day. The Court heard testimony from the parties for the purpose of setting child support, and imputed a full time, minimum wage earning capability to Flemming as she stated that she was employed at McDonalds and made \$6.50 an hour and worked just under thirty hours a week. Elder testified that he had two jobs. He worked seven hours a week at one job and made \$6.00 an hour. He also worked at Krysal thirty-five hours a week and made \$7.00 an hour. The Court determined his monthly income to be \$1,243.67.

The parties testified regarding the father's visitation with the child. They agreed that he came to Flemming's home for five to six hours every day after work. Based upon this testimony, the Court found the father exercised thirty-eight hours of visitation a week, which the Court translated into three blocks of at least twelve hours. Therefore, the Court found the father exercised three days of visitation per week, or one hundred and fifty-six days per year. Based upon this finding, the Court decreased his child support obligation from \$261.00 per month to \$110.00 per month. The referee entered Findings and Recommendations on May 1, 2008 that provided respondent's monthly child support obligation be set at \$110.00 and reserved the issue of medical support.

On May 6, 2008, the State filed a notice of appeal in the Juvenile Court for the purpose of obtaining a hearing before the Juvenile Court Judge. The appeal was heard on July 14, 2008 before the Juvenile Judge, and an order was entered dismissing the appeal and affirming the Findings and Recommendations of the referee.

A second Findings and Recommendations was filed by the referee on September 3, 2008 following a hearing, and current child support was recorded as \$110.00 per month. It was noted that respondent exercised 156 days of visitation per year, based on the reported five or six hours of visitation a day, or thirty-eight hours per week. The Court stated that thirty-eight hours a week translated into 3 days per week. The State renewed its objection to the Court's findings but the Court overruled the objection. The referee found child support arrearage of \$1,265.06 and ordered respondent to retire the arrearage by paying an additional \$20.00 a month in support. The referee stated the respondent had no medical insurance available to him at a reasonable cost but he would obtain insurance if it became available to him at a reasonable cost. The respondent was made

responsible for 50% of all medical expenses not covered by insurance.

The State appealed and raised this issue:

Whether the Juvenile Court abused its discretion when it calculated the number of days respondent spent parenting the child?

The standard of review of a trial court's findings of fact is *de novo* with a presumption that the findings of fact are correct unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d). Issues of law are reviewed *de novo* with no presumption of correctness. *Nelson v. Wal-Mart Stores, Inc.*, 8 S.W.3d 625, 628 (Tenn.1999).

Our review of child support decisions is based on the “abuse of discretion” standard of review. *Johnson v. Johnson*, No. M2008-00236-COA-R3-CV, 2009 WL 890893 at * 3 (Tenn. Ct. App. Apr. 2, 2009). This Court will set aside a discretionary decision if it rests on an inadequate evidentiary foundation or if it is contrary to the governing law, but will not substitute its judgment for that of the trial court. *See, Johnson* at *3.

The goal of the statutes and regulations governing child support is to assure that children receive support reasonably consistent with their parent or parents' financial resources. The statutes and regulations promote this goal by requiring the courts to set child support using guidelines developed by the Tennessee Department of Human Services to promote both efficient child support proceedings and dependable, consistent child support awards. *State ex rel. Vaughn v. Kaatrude*, 21 S.W.3d 244, 248 -249 (Tenn. Ct. App. 2000); *also see* Tenn. Code Ann. § 36-5-101(e) (Supp.1999); Tenn. Comp.R. & Regs. r. 1240-2-4-.02(2)(b) and (c) (1994).

The State argues that the Juvenile Court did not follow the applicable rule when it downwardly adjusted Elder’s support obligation based on a finding that he had visitation with the child three days a week. The ruling of the Order at issue on appeal is as follows:

2. CURRENT CHILD SUPPORT:

✓ a. Respondent’s monthly current child support obligation is \$110. The Court finds that Respondent exercises 156 days of visitation per year, calculated by counting the 5 - 6 hours per day visitation. The Parties testified that the visitation is exercised at the Petitioner’s home and averages 38 hours per week, or three days per week for an annualized amount of visitation of 156 days.

The rules promulgated by the Department of Human Services defines “Days” for the purpose of calculating child support under the Guidelines as follows:

"Days" -- For purposes of this chapter, a "day" of parenting time occurs when the child spends *more than twelve (12) consecutive hours in a twenty-four (24) hour period* under the care, control or direct supervision of one parent or caretaker. The

twenty-four (24) hour period need not be the same as a twenty-four (24) hour calendar day. Accordingly, a "day" of parenting time may encompass either an overnight period or a daytime period, or a combination thereof.

Tenn. Comp. R. & Regs. 1240-2-4-.02(10)(emphasis added).

In *Eaves v. Eaves*, No. E2006-02185-COA-R3-CV, 2007 WL 4224715 (Tenn. Ct. App. Nov. 30, 2007) the disputed issue before the Court was, as here, the proper method of counting the partial days in the regular weekly and biweekly schedule, when the children spend part of the day with one parent and part with the other. *Id.* at * 6. The Court stated that Rule 1240-2-4-.02(10) of the Guidelines provides the rule of decision for this issue. The Wife in *Eaves* claimed that Husband, who had parenting time every other weekend from Friday at 3:30 p.m. to the start of school Monday morning, only had the children for two days under the rule. The court held the Wife's interpretation of the rule was incorrect and that under the rule, a stretch of time starting Friday at 3:30 p.m. and ending sometime Monday morning counts as three days, since that stretch includes three 24-hour periods during which the children spend more than half of the period with Husband. The Court gave an example: "For instance, the children are with Husband for 20.5 out of 24 hours between noon Friday and noon Saturday; for all 24 hours from noon Saturday until noon Sunday; and for another 20.5 out of 24 hours from noon Sunday until noon Monday." The Court said that this method of counting is clearly allowable according to the plain meaning of Rule 1240-2-4-.02(10), which states explicitly that "[t]he twenty-four (24) hour period need not be the same as a twenty-four (24) hour calendar day." *Id.* at * 7. *See also, Walls v. Walls*, No. E2007-02156-COA-R3-CV, 2008 WL 4414710 at * 1 (Tenn. Ct. App. Sept. 29, 2008)(reaffirming the holding in *Eaves*); *Kawatra v. Kawatra* 182 S.W.3d 800, 803 (Tenn. 2005)(referencing Tenn. Comp. R. & Regs. 1240-2-4-.02(10) (2005) for the definition of "day" under the Child Support Guidelines).

There was no transcript of the hearing at issue and we only have the statement made in the Findings and Recommendations by the Court regarding how he calculated the number of visitation days and the facts set forth in the Statement of the Evidence. According to the Statement of the Evidence, the father and the mother agreed that the father came to the mother's house every day after work and spent five to six hours there. From this testimony, the Court calculated the father's visitation with the child was three days a week or one hundred and fifty-six days a year. Based on this calculation, the Court adjusted the father's child support obligation downward by \$151.00, from \$261.00 to \$110.00 a month. The Juvenile Court's calculation of the number of days he spent with the child does not comply with the Guidelines. The applicable rule provides that for the court to find that the parent has spent a parenting "day" with the child, the child must spend more than twelve consecutive hours in a twenty-four hour period under the care, control or direct supervision of one parent.

The evidence is meager here, but the one fact agreed on by the Court and the State is that the parents both testified that the father spends five to six hours after work at the mother's house. Assuming that the child is in the home when the father visits, and assuming that the child is

in the father's care, control and under his supervision during that period of time,¹ the evidence demonstrates that the father was not in the mother and child's home for more than twelve consecutive hours at a time. The evidence at best establishes the father was in the home for only half that period of time. Accordingly, respondent spent no "days" with the child as defined by the statute for purposes of the calculation of child support obligations, and the Trial Court abused its discretion when it held the father exercised visitation three days a week or one hundred and fifty-six days a year. We vacate the Trial Court's Judgment, the award of child support, and remand for the purpose of establishing the appropriate amount of child support based upon the respondent's lack of parenting time.

The Judgment of the Trial Court is vacated and the cause remanded for proceedings consistent with this Opinion. The costs of the appeal are assessed to Roy Elder.

HERSCHEL PICKENS FRANKS, P.J.

¹ There was no testimony regarding whether the child was in the home with the father or whether he or the mother took care of the child while he was in the home. Moreover, a "day" would obligate that parent to "support" the child during that "day". A few hours visit in the custodial parent's home would not constitute a "day".